BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

THE OPINION OF THE COURT BELOW.

The opinion of the Court of Appeals for the Eighth Circuit is reported in 133 F. (2d) 709. The per curiam opinion on motion for rehearing is set out at pages 367 and 368 of the transcript.

II.

JURISDICTION.

The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, 43 Stat. 938 (28 U. S. C. A., Sec. 347).

The judgment of the Circuit Court of Appeals, Eighth Circuit, reversing and remanding the case to the District Court of the United States for the Eastern District of Missouri, was entered on February 23, 1943 (Tr., p. 340), and the petition for rehearing was denied on April 7, 1943 (Tr., p. 367). Thirty days stay of mandate was granted on April 19, 1943 (Tr., pp. 369-370).

The following cases are believed to sustain the jurisdiction of this Court:

Erie R. R. v. Tompkins, 304 U. S. 64;
Ruhlin v. New York Life Ins. Co., 304 U. S. 202;
Lyon v. Mut. Ben. H. & A. Co., 305 U. S. 484;
Wichita Royalty Co. v. City National Bank, 306 U. S. 103;
Continental Casualty Co. v. Agee, 268 U. S. 687.

III.

STATEMENT OF THE CASE.

Under the heading A in the petition ante is a statement of the case in so far as it is material to the consideration of the question presented, and in the interest of brevity is not repeated here.

IV.

SPECIFICATION OF ERRORS.

1. The Circuit Court of Appeals, Eighth Circuit, erred in failing to apply the Missouri law that the furnishing of proof of disability, under the policy in suit, is a condition precedent to liability, and consequently erred in holding that the insanity of the insured rendered unnecessary the furnishing of said proof.

2. After its attention was called to a case pending in the Supreme Court of Missouri in which the precise and specific point here involved was before that Court for determination, the Court of Appeals, Eighth Circuit, erred in failing to defer its final decision in this case, and erred in reversing and remanding the case to the District Court for retrial.

ARGUMENT.

Under the Missouri law, the provision in the policy in suit requiring the furnishing of proof was a condition precedent to the liability of the insurer for any disability benefits (Missouri cases cited under B 2).

If the furnishing of said proof is a valid condition precedent to liability, then nothing excuses the performance of that condition. It is a covenant of the insurer freely and lawfully made and must be performed if the consideration which is conditioned upon its performance is to be obtained. The Court erred, therefore, in holding that the subsequent insanity of the insured excused or rendered unnecessary the furnishing of proof. To so hold is to fail to give force and effect to the Missouri law that the furnishing of proof is a *condition precedent* and hence violates the rule announced by this Court in Erie R. R. v. Tompkins, 304 U. S. 64, and kindred cases.

Since the attention of the Court of Appeals, Eighth Circuit, was specifically called to the fact that the precise point involved was pending before the Supreme Court of Missouri in the Schoen case, set for hearing in that court on May 21, 1943, the Court of Appeals, Eighth Circuit, erred in not deferring its final decision until the Missouri Supreme Court had announced the controlling law. By so failing to defer its decision, the Court of Appeals, Eighth Circuit, has imposed the costs of the appeal upon this petitioner and the trouble and expense of a new trial in the District Court, all of which might be avoided if the Court of Appeals had retained jurisdiction of the case and deferred its final decision pending the outcome of the case in the Missouri Supreme Court. The action of the Court of Appeals was thus a violation of the spirit and purpose of the rule of this Court as announced in Erie

R. R. v. Tompkins, 304 U. S. 64. Precedent for granting the writ of certiorari under the circumstances obtaining here is found in the action of this Court in *Continental Casualty Co. v. Agee*, 268 U. S. 687, in which this Court granted its writ of certiorari to review the decision of the Circuit Court of Appeals, Eighth Circuit, when the attention of that Court was called to the fact that there was pending in the Supreme Court of Utah a case involving the construction of a suicide statute of Utah which would have been controlling upon the Court if it had deferred its decision in the Agee case, which it had declined to do, pending the determination by the Supreme Court of Utah of the case in that court. That decision was rendered and the writ therein granted before the decision of this Court in Erie v. Tompkins. *A fortiori*, since Erie v. Tompkins, we respectfully submit that, in the exercise by this Court of its supervisory powers, the writ should be granted as prayed.

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